that granting such work authorizations would encourage unfounded appeals and unfairly diminish job opportunities for those who are legally residing in this country. Cf. *INS* v. *National Center for Immigrants' Rights*, 112 S. Ct. 551, 558 (1991) (*NCIR*) (noting that "preserv[ing] jobs for American workers" is an "established concern of immigration law"). That choice places a serious burden on individuals like those in the respondent classes who took the effort to file applications before the application period expired, but it did not deprive them of an opportunity for effective judicial review. The fact is, Congress has not chosen to grant persons subject to deportation a general authorization to work during the pendency of their legal challenges. Indeed, as this Court held last year in *NCIR*, INS is entitled to detain individuals pending resolution of their deportation proceedings unless they agree that they will not work unlawfully. Respondent's discussion on this point in fact reflects nothing more than a disagreement with the policy chosen by Congress.[14]

The bottom line is that respondents are a group of individuals who had a different view of the legalization requirements from INS and thus believed that they were eligible for relief, but would not have been immediately successful if they had sought legalization from INS. Their desire to short-circuit the process and go directly to the district courts flies in the face of Congress's determination that litigation about INS's refusal to grant legalization applications should await the entire administrative process—including deportation proceedings—and should be channeled directly to the courts of appeals, for one final decision that would determine

[14] An analogous problem for aliens challenging their deportation appears in the provision in the Immigration and Nationality Act that requires aliens in deportation proceedings to pay for their own counsel. See 8 U.S.C. 1252(b)(2) ("the alien shall have the privilege of being represented (at no expense to the Government)").

definitively whether the alien is entitled to stay in this country. The contrary decision of the court of appeals should be reversed.

3. Respondents' arguments on the remedial question are even less persuasive than their arguments on the jurisdictional question.

a. Respondents' argument focuses on their repeated assertion that these cases involve individuals from whom INS unlawfully refused to accept applications.[15] That assertion is incorrect: these cases do not involve individuals from whom INS refused to accept applications; they involve individuals who did not file applications because they believed INS would deny relief. The government concedes that any individual who actually attempted to file an application (accompanied by the appropriate filing fees) during the application period, but failed because government agents refused to accept it, would be an individual who "appl[ied] for * * * adjustment" within the meaning of 8 U.S.C. 1255a(f) (1)(A).[16] Similarly, in our view, any refusal by INS to allow an individual to file an application, would constitute a "denial" of the application reviewable in the courts of appeals in

[15] See, *e.g.*, Resp. Br. 16 (stating that "INS and its QDEs refused to accept applications submitted by class members"); *id.* at 35 n.47 ("a large number of the class members actually tried to file applications with INS or its QDE agents"); *id.* at 40 (stating that "INS simply 'rejected' th[e] applications [of class members]").

[16] Such a showing would require an alien to demonstrate that the government agent refused to accept the application despite INS's written procedures, which required the government to accept applications from aliens the government believed to be ineligible if the alien insisted. See pages 8-9 *supra*. As respondents acknowledge (Resp. Br. 38 n.51), INS has granted relief to individuals who can establish that they actually had attempted to file a timely application.

connection with any order of deportation entered against the alien, as provided by 8 U.S.C. 1255a(f)(4)(A).[17]

In any event, the question whether the district court could grant relief to an alien if INS improperly refused to accept an application is not properly before the Court. First, the classes defined by the district courts are not classes of aliens who attempted to file; they are classes of aliens who chose not to file. See Pet. App. 25a (*CSS* class includes aliens who "knew of [the challenged] regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application"); J.A. 216 (*LULAC* class includes aliens who, "relying upon information that they were ineligible, did not apply for legalization before the * * * deadline"). Second, respondents have failed to establish that any of the named class representatives in either case attempted to file applications.[18] Accordingly, there is no reason for the Court to consider the proper treatment of turnaways. Cf.

[17] INS regulations also allow the regional processing facility to reconsider the denial *sua sponte* if the applicant files an appeal to the Associate Commissioner; similarly the Associate Commissioner may reopen any prior decision he has made. See 8 C.F.R. 103.5(b); *In re O—*, 19 I. & N. Dec. 871, 871 (L.A.U. 1989) (reopening is proper if "manifest injustice would occur if the prior decision were permitted to stand"). Proceedings have been reopened under this regulation in several cases. See, *e.g.*, In re O—, supra; *In re N—*, 19 I. & N. Dec. 760, 760 (L.A.U. 1988); *In re S—*, 19 I. & N. Dec. 851, 854 (L.A.U. 1988).

[18] See First Amended Compl. ¶¶ 18-22, Clerk's Record (LULAC) item 56, at 11-15 (four class representatives filed timely applications; the fifth declined to file based on media reports and the advice of an attorney); Sixth Amended Compl. ¶¶ 18-29, Clerk's Record (CSS) item 140, at 12-25 (description of factual circumstances of class representatives; no allegation that class representatives were turned away). We note that respondents offer no record support for their allegations (see note 15, *supra*) that INS improperly refused to accept applications from members of the respondent classes.

Fed. R. Civ. P. 23(a)(3) (class representatives must have claims "typical of the claims or defenses of the class").

b. Turning to the classes of respondents before the Court, it is clear that there is no basis for the court of appeals' decision to require INS to consider their claims for relief. At bottom, respondents' argument is that INS truthfully publicized its view of the requirements for relief under IRCA, and respondents decided not to file. If respondents are correct in arguing that those circumstances are adequate to justify circumvention of statutory filing deadlines, then no party need ever seek relief from a government agency in a timely manner if it disagrees with the agency's interpretation of the requirements for relief; it instead can ignore filing deadlines and sit back waiting for a definitive legal resolution of the controversy. That result cannot be, and is not, correct.

Respondents rely (Resp. Br. 35-42) on the doctrine of equitable tolling, as enunciated by this Court in *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1991), but nothing in *Irwin* supports respondents. First, *Irwin* dealt with statutes of limitations and other "statutory time limits applicable to lawsuits." *Id.* at 457. These cases, by contrast, present an argument that the Executive Branch must grant relief in the absence of one of the statutorily mandated requirements for relief, Section 1255a(a)(1). Even though equitable tolling may be available with respect to statutes of limitation, it should not be applied to contravene a specific requirement for relief, especially in a case, like this one, where Congress has precluded any admin-istrative or judicial review of denial of an application for failure to meet that requirement, see Section 1255a(f)(2); Gov't Br. 32 & n.34.[19]

[19] Contrary to respondents' contentions (Resp. Br. 37 n.51), INS did not grant relief to any class of individuals that failed to apply for

In any event, even if equitable tolling principles apply, they would not support relief in these cases any more than they supported relief in *Irwin*. As the Court explained

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adjustment before the deadline. The first authority respondents cite was a regional notice suggesting that filing an application for registry under 8 U.S.C. 1259 before the deadline for applying for legalization would be sufficient to toll the legalization deadline. See Legalization Wire # 197, Clerk's Record (LULAC) item 65, Exh. 1. The Assistant Commissioner (Office of Legalization), referred to as "COLEG," promptly countermanded that notice, explaining in an August 8, 1988 wire: "It has been brought to the attention of COLEG that a policy wire has been issued at the regional office level [permitting extension of the deadline based on an application for registry]. At no time, repeat, at no time, has this been the INS' policy." Wire CO 1588-0, App., *infra*, 1a; see also Legalization Wire # 264 (Aug. 11, 1988), App., *infra*, 2a (expressly rescinding Legalization Wire # 197 and stating that "[a]t no time has this been Immigration and Naturalization Service policy.").

The second matter respondents cite (Resp. Br. 37 n.51) is INS's practice of dating applications from the time they were submitted to a QDE. That policy was required by the terms of IRCA, which provided that an applicant could apply not only to the Attorney General, but also to QDEs. See 8 U.S.C. 1255a(c)(1)(B).

Finally, respondents rely (Resp. Br. 38 n.51) on two decisions of the Northern Regional Processing Center. In both cases, the applicants established that they had attempted to file applications before a deadline, but were turned away. See *In re* —, (Northern Regional Processing Facility Mar. 14, 1988) (Am. Immigr. Law. Ass'n reprint No. LO688-189) (alien appeared at office before deadline but was required to make an appointment after deadline); *In re* —-(Northern Regional Processing Facility June 27, 1988) (Am. Immigr. Law. Ass'n reprint No. LO988-347) (alien appeared at office before deadline with multiple applications and a single money order, rather than separate money orders for each application). Consistent with the policy we explained above (see pages 13-14, *supra*), the Legalization Appeals Unit allowed the individuals to seek relief. Respondents have represented to the government that they will lodge copies of those decisions with the Court. Those decisions, of course, are consistent with the government's present position; the applicants in those cases, unlike respondents, "appl[ied]" for relief before the deadline.

there, equitable tolling typically is available in two situations:

> [1] where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or [2] where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.

111 S. Ct. at 458. Respondents, of course, did not file pleadings during the application period; if they had, INS would have granted them relief when it receded from the challenged regulations, as it did for the class members who did file timely applications.[20]

Similarly, respondents were not tricked into allowing the deadline to pass by "misconduct"; they simply chose not to challenge the government's duly promulgated view of the requirements for relief. Respondents' reliance (Resp. Br. 38-39) on *Bowen* v. *City of New York*, 476 U.S. 467 (1986), to establish misconduct is unsuccessful. As the Court explained in *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988), *City of New York* turned on the fact that the challenged policy was "a secret, internal policy." *Id.* at 123. By contrast, the classes in these cases by definition include only individuals who knew about the challenged policies. See Gov't Br. 33 & n.35.[21]

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[20] Respondents miss the point in suggesting (Resp. Br. 39) that it would be unfair to ask for "more diligence" because they filed one of these class actions only "six days after IRCA became law." Although the class actions were filed in the district courts, no members of the classes before the Court filed applications of any kind with INS during the applicable time period.

[21] Because the classes include only respondents who knew about the challenged INS policies, respondents are not in a position to claim (see Resp. Br. 39) that INS violated its statutory obligation to publicize the relief available under IRCA, see 8 U.S.C. 1255a(i). In any event, respondents' real complaint does not seem to be that INS failed to

Even more surprisingly, respondents suggest that the extension is proper because it "is consonant with the legislative scheme." Resp. Br. 37; see *id.* at 47 (relying on "the purpose of the 12-month application period"). Rarely will the Court decide a case in which Congress has made so clear its intent not to allow judicial intervention to extend statutory deadlines. As we have explained, paragraphs (3) and (4) of Section 1255a(f) provide generally for judicial review of INS determinations respecting applications for adjustment. But paragraph (2) imposes a clear and dispositive exception:

> No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

8 U.S.C. 1255a(f)(2). Whatever purposes respondents may attempt to glean from the legislative history, Congress's purpose with respect to the application period is clear from the statute: courts are not to extend the deadline.[22]

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publicize the requirements for relief; it is that INS publicized *its* view of the requirements rather than respondents' view.

[22] Respondents argue (Resp. Br. 13 n.19) that the Court should not evaluate the propriety of the district court's "alternative" injunction, because the court of appeals did not decide that question and because it was not properly presented in our petition. We disagree. First, in our view, the propriety of the alternative injunction is fairly included in the second question in our petition, which asks whether 8 U.S.C. 1255a "bar[s] the district courts from ordering the Immigration and Naturalization Service to extend [the statutory] deadline." Because there is no basis other than 8 U.S.C. 1255a for the district court's order requiring INS to allow respondents a permanent right to work and reside in the United States, and because that order grants relief to individuals who did not apply before the deadline, we believe the propriety of the order is fairly included in the question presented.

Finally, respondents and their amici suggest that unless the lower courts had the power to extend the statutory deadline, the federal courts are powerless to remedy any wrong caused by INS's challenged regulations. Resp. Br. 34, 43; ACLU Br. 14-20. Not so. It may be that the federal courts are powerless to grant relief to individuals who failed to seek relief, but the courts of appeals were, and are, available to grant relief to individuals who filed timely applications that may have been denied improperly. See, *e.g.*, *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990) (overturning an INS decision denying adjustment of status).[23] The inability of the district courts to grant relief is simply a facet of the statute; it does not reflect any deficiency in the general equitable powers of the federal courts.

For the foregoing reasons and those set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

We have presented the matter to the Court to offer a full view of the types of relief that the lower courts believe they can enter notwithstanding statutory deadlines. In our view, any resolution of the second question in our favor would be highly likely to require reversal of the alternative injunction as well. In light of the protracted pendency of this litigation, we thought it would be best to give the Court the flexibility to dispose of the matter finally at this time.

[23] Also, to the extent individuals raise a collateral challenge to procedures (like the claimants in *McNary* or claimants in the hypothetical situation in which INS declined to establish a twelve-month application period, posed at Resp. Br. 48 n.61), the individuals would have been able to file an action directly in the district court.

APPENDIX

TELEGRAPHIC MESSAGE

NAME OF AGENCY	PRECEDENCE	SECURITY CLASSIFICATION
U.S. IMMIGRATION & NATURALIZATION SVC.	PRIORITY ACTION INFO	UNCLASSIFIED
ACCOUNTING CLASSIFICATION	**DATE PREPARED**	**FILE**
1581217/81 CE 2211.790	AUGUST 08, 1988	CO 1588-0
FOR INFORMATION CALL		
NAME	**PHONE NUMBER**	**TYPE OF MESSAGE**
TERRANCE M. O'REILLY, COLEG	FTS 633-5309	[X] SINGLE [ ] BOOK [ ] MULTIPLE ADDRESS

THIS SPACE FOR USE OF COMMUNICATION UNIT

MESSAGE TO BE TRANSMITTED *(Use double spacing and all capital letters)*

TO:

ROCOMs: ERO, SRO, NRO, WRO; ROLECs: ETO, SRO, NRO, WRO

IT HAS BEEN BROUGHT TO THE ATTENTION OF COLEG THAT A POLICY WIRE HAS BEEN ISSUED AT THE REGIONAL OFFICE LEVEL ADDRESSING THE SUBJECT OF THE REGISTRY APPLICANT'S ABILITY TO FILE FOR LEGALIZATION IF THE REGISTRY APPLICATION WAS FILED PRIOR TO MAY 4, 1988, AND SUBSEQUENTLY DENIED. THE WIRE ALSO STATES THAT THE DATE OF APPLICATION FOR LEGALIZATION WILL BE THE DATE THAT THE APPLICANT FILED FOR REGISTRY.

AT NO TIME, REPEAT, AT NO TIME, HAS THIS BEEN THE INS' POLI[illegible]

IF POLICY WIRES AND/OR MEMOS ADDRESSING THIS SUBJECT HAVE BEEN ERRONEOUSLY ISSUED, THEY SHOULD IMMEDIATELY BE RESCINDED AT THE LEVEL OF ISSUE. A COPY OF THE RESCISSION SHOULD THEN BE TELEFAXED TO COLEG, ATTN: RAYMOND B. PENN, ASSISTANT COMMISSIONER, COLEG, FTS 633-3296.

/S/ Raymond B. Penn
RAYMOND B. PENN
COLEG

ROCOM: BUR, DLS, TWC, SPD
ROLEG: BUR, DLS, TWC, LAGUNA NIGUEL CA

PAGE NO.	NO. OF PGS	SECURITY CLASSIFICATION
1	1	UNCLASSIFIED

STANDARD FORM 14
REVISED 11-80
GSA FPMR (41 CFR) 101-35.306

TELEGRAPHIC MESSAGE

NAME OF AGENCY	PREDENCE	SECURITY CLASSIFICATION
SRO/INS	ACTION PP INFO	UNCLASS
ACCOUNTING CLASSIFICATION	**DATE PREPARED**	**FILE**
158121/7/2211790	8-11-88	LEGALIZATION WIRE # 264
FOR INFORMATION CALL		
NAME	**PHONE NUMBER**	**TYPE OF MESSAGE**
WILLIAM E. ZIMMER REGIONAL LEGALIZATION MANAGER	767-7368	☐ SINGLE ☐ BOOK ☐ MULTIPLE-ADDRESS

THIS SPACE FOR USE OF COMMUNICATION UNIT

MESSAGE TO BE TRANSMITTED *(Use double spacing and all capital letters)*

TO:

ALL DISTRICT DIRECTORS
ATTN: ALL DISTRICT LEGALIZATION MANAGERS
ALL LEGALIZATION SITE SUPERVISORS
SOUTHERN REGION

ALL OF REGIONAL, WIRE #197 IS HEREBY RESCINDED. AT NO TIME HAS THIS BEEN IMMIGRATION AND NATURALIZATION SERVICE POLICY. THE INSTRUCTION PERMITTING AN APPLICANT TO CARRY OVER BEYOND MAY 4, 1988, THE DATE OF AN UNSUCCESSFUL APPLICATION FOR REGISTRY IS AND WAS INCORRECT. THEREFORE UNSUCCESSFUL APPLICANTS FOR REGISTRY MAY NOT USE THE FILING DATE OF THIS APPLICATION IN APPLYING FOR ADJUSTMENT UNDER 245(a). PLEASE BE GUIDED ACCORDINGLY.

/S/ William E. Zimmer
WILLIAM E. ZIMMER
REGIONAL LEGALIZATION MANAGER

PAGE NO.	NO. OF PGS	SECURITY CLASSIFICATION
1	1	UNCLASS

STANDARD FORM 14
REVISED 11-80
GSA FPMR (41 CFR) 101-35.306

AMICUS CURIAE

BRIEF

SEP 21 1992
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

WILLIAM P. BARR,
Attorney General of the United States,
Petitioner,

VS.

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
Respondents.

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

VS.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF AMICUS CURIAE OF CHURCH WORLD SERVICE, UNITED STATES CATHOLIC CONFERENCE, LUTHERAN IMMIGRATION AND REFUGEE SERVICE AND AMERICAN JEWISH COMMITTEE IN SUPPORT OF RESPONDENTS

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No. 91-1826

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM P. BARR,
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BRIEF AMICUS CURIAE OF CHURCH WORLD SERVICE, UNITED STATES CATHOLIC CONFERENCE, LUTHERAN IMMIGRATION AND REFUGEE SERVICE AND AMERICAN JEWISH COMMITTEE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Church World Service, United States Catholic Conference, Lutheran Immigration and Refugee Service and American Jewish Committee respectfully submit this brief *amicus curiae* in support of the Respondent class members ("Respondents"). *Amici* urge this Court to affirm the conclusion of the Ninth Circuit that district courts have the equitable authority to extend the time period for Respondents to apply for legalization pursuant to the

Immigration Reform and Control Act of 1986 ("IRCA"). Equitable relief is particularly appropriate in this case because Congress plainly intended in enacting IRCA that Respondents have a meaningful opportunity to apply for legalization. Significantly, persons in the Respondent classes are statutorily eligible for legalization. The *sole* reason Respondents did not timely file their legalization applications is that they were unlawfully prevented from doing so by the Immigration and Naturalization Service ("INS"): either their applications were rejected by INS clerks following instructions issued by the agency's central office, or they were deterred from filing by the INS's outreach and education campaign, which erroneously informed them that they were ineligible.

Amici have extensive experience working with immigrants and refugees residing in this country, including persons in the Respondent classes. *Amici* believe that it would be fundamentally unfair—not to mention contrary to Congressional intent—to reverse the Ninth Circuit and deny Respondents the opportunity to have their legalization applications decided. Approximately 300,000 putative class members have emerged from the "shadow underground" as a result of the stay orders issued by the district courts. They have filed legalization applications and supporting documents with the INS in an attempt to end their clandestine, underground status. They all now possess receipts issued by the INS. As many as 75,000 class members have been issued stays of deportation and employment authorization. Hence, just as Congress intended, Respondents no longer are living in the "shadow underground." Reversal by this Court would revert hundreds of thousands of Respondent class members to "illegal" underground status. Their legalization applications would be destroyed. They would once again face exploitation when working for employers willing to violate the employer sanctions law, they would once again face the prospect of living in substandard housing owned by landlords willing to violate housing codes, and they would once again be fearful to turn to, or cooperate with, law enforcement authorities

when to do so would clearly benefit the community. For all of these reasons and the reasons set forth below, *amici* urge this Court to affirm the decision of the Ninth Circuit.

Church World Service

Church World Service, founded in 1946, is an ecumenical agency of the National Council of the Churches of Christ in the U.S.A. ("NCC"), and works to provide humanitarian and development assistance to persons in need all over the world. The Immigration and Refugee Program ("IRP") is distinct within Church World Service, dealing specifically with refugee and immigration concerns. Refugee resettlement is a major component of IRP, in which national denominations work together ecumenically in resettling refugees with their local congregations in communities across our country. In addition to working with refugees resettling in communities under the United States Refugee Program, IRP also facilitates denominational support of a network of asylum and immigration projects across the country to counsel and assist undocumented immigrants and seekers of asylum and safe haven.

United States Catholic Conference

The United States Catholic Conference (the "Conference") is a non-profit corporation organized under the laws of the District of Columbia. All active Catholic Bishops in the United States are members of the Conference. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, civil rights, the economy, communications, housing and immigration. The Conference has been settling refugees since the 1920's and is presently the single largest refugee resettlement organization in the United States. In collaboration with the Catholic Legal Immigration Network, the Conference resettles and assists in providing legal and social services to thousands of immigrants. The Conference is a frequent participant in INS proceedings in support of the rights of both documented

and undocumented aliens, including refugees and asylum-seekers. The Conference was a Qualified Designated Entity ("QDE") under IRCA and processed over 215,000 applications for legalization.

Lutheran Immigration and Refugee Service

The Lutheran Immigration and Refugee Service ("LIRS") is a cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod and the Latvian Evangelical Lutheran Church in America. LIRS provides a variety of immigration, asylum and refugee-related services. While engaging in service, LIRS has consistently advocated fair and humane treatment for uprooted people. LIRS participated in the legalization program of IRCA as a National Coordinating Agency. LIRS coordinated the efforts of 19 affiliated Qualified Designated Entities ("QDE's") and completed legalization applications for more than 7,300 persons. The QDE's provided counseling to thousands more. Based on its experience with the amnesty program, LIRS believes that equitable relief should be offered to the thousands of people who are statutorily eligible for legalization, yet were excluded from the program.

American Jewish Committee

The American Jewish Committee ("AJC") is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. Since all American Jews are either immigrants or the descendants of immigrants, if not refugees or the descendants of refugees, AJC has always supported generous interpretations of immigration and refugee laws and policies. Through the years, therefore, AJC has joined with other *amicus curiae* in numerous cases involving issues before this Court. The case at bar affords AJC an opportunity to do so once again.

SUMMARY OF ARGUMENT

Amici urge this Court to uphold the Ninth Circuit's conclusion that district courts have the authority to grant equitable relief in the form of an extension of the time period for Respondents to apply for legalization. The Respondent classes are comprised of persons statutorily eligible for legalization, but who did not timely apply because they either were erroneously told by the INS that they were ineligible, or they were deterred by the invalid INS regulations from timely filing their applications. The Ninth Circuit correctly determined that to deny equitable relief and foreclose Respondents' legalization applications would be contrary to Congress' directive that IRCA be implemented in a "liberal and generous fashion." Moreover, the equitable relief fashioned by the district courts below effectuates, rather than frustrates, the Congressional intent in enacting IRCA because Respondents were unlawfully excluded by the INS from participation in the legalization program; thus, a brief extension best ensures that all *eligible* persons have a meaningful opportunity to apply for legalization and attain documented status. Reversal not only would dramatically increase the undocumented population Congress sought to decrease in enacting IRCA, it would have a devastating impact on the already-injured class members, some of whom would face deportation, involuntary separation from their families, and the loss of all they have achieved in over a decade of life in this country.

ARGUMENT

I.

THIS COURT SHOULD AFFIRM THE NINTH CIRCUIT'S CONCLUSION THAT DISTRICT COURTS HAVE THE EQUITABLE AUTHORITY TO EXTEND THE TIME PERIOD FOR RESPONDENTS TO APPLY FOR LEGALIZATION.

The Ninth Circuit properly concluded that the equitable remedy provided by the district courts—a brief

extension of the time period for Respondents to file their legalization applications—is appropriate and consistent with the Congressional intent in enacting IRCA. IMMIGRATION REFORM AND CONTROL ACT OF 1986, PUB. L. NO. 99-603, 100 STAT. 3359 (1986). As the Ninth Circuit stated in its opinion affirming the actions of the district court below:

> "*Congress clearly intended for illegal aliens to have ample and meaningful opportunities to apply for adjustments of status*. The members of the plaintiff class did not have such opportunities because the INS's interpretation of the 'brief, casual and innocent' provision was not invalidated until the Attorney General's deadline had almost expired." (*Catholic Social Servs., Inc. v. Thornburgh*, 956 F.2d 914, 922 (9th Cir. 1992), *cert. granted*, 112 S. Ct. 2990 (1992) (emphasis added))

Moreover, as *amici* demonstrate *infra*, in addition to ensuring an ample time period for Respondents to apply for an adjustment of their status, Congress intended that legalization eliminate as much as possible of the unregulated "shadow underground" in which all or many undocumented persons exist in this country.[1] *Amici* contend that

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[1]This Court recognized the vulnerable plight of those living in the "shadow underground" well before the enactment of IRCA:

> "Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants - numbering in the millions - within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass

(continued...)

foreclosure of Respondents' legalization applications would inevitably and unfairly banish these people back to the "shadow underground" Congress sought to eliminate. *See* Part B, *infra*. *Amici* further contend that Congress also recognized that to subject potentially tens of thousands of persons—such as Respondents and their families—to the hardship of deportation would be costly, ineffective and morally unacceptable. *See* Part C, *infra*.

In brief, *amici* submit that the equitable relief fashioned by the district courts both effectuates Congressional intent and remedies the injustice wrought upon Respondents by virtue of the admitted misinterpretation and misimplementation of IRCA by the INS.

A. The Ninth Circuit Correctly Determined That It Would Be Contrary To Congressional Intent To Foreclose Respondents' Applications For Legalization.

Without question, Congress intended that the legalization program be implemented by the INS in a "liberal and generous fashion." H.R. REP. No. 99-682(I), 99th Cong., 2d Sess. 72 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5676 (hereinafter "H.R. REP. 99-682").[2] To maximize the participation of eligible legalization candidates, Congress directed the Attorney General to "broadly disseminate information respecting the benefits which aliens may receive

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[1](...continued)

> presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." (*Plyler v. Doe*, 457 U.S. 202, 218-19 (1982))

See also McNary v. Haitian Refugee Center, Inc., 111 S. Ct. 888, 890 (1991) ("[IRCA] constituted a major statutory response to the vast tide of illegal immigration that had produced a 'shadow population' of literally millions of undocumented aliens in the United States.")

[2]Further citations to the Report will indicate specific page numbers to the Report itself as well as to the parallel reprint in U.S. CODE CONGRESSIONAL & ADMINISTRATIVE NEWS ("U.S.C.C.A.N.").

[by legalization] and the requirements to obtain such benefits." 8 U.S.C. §1255a(i). To ensure that this information would reach the targeted persons well in advance of the commencement of the 12-month legalization application period, Congress decided that the application period would not commence immediately upon enactment of IRCA, but rather six months after enactment. *Id.* at §1255a(a)(1)(A). In recognition of the historically adversarial and distrustful relationship between undocumented immigrants and the INS,[3] Congress further provided that the INS was to contract with and fund the efforts of "Qualified Designated Entities" ("QDEs")—primarily churches and social service agencies—to provide preliminary eligibility screening for potential legalization applicants. *See* 8 U.S.C.

[3]This Court recently acknowledged the historically adverse relationship between the INS and illegal immigrants in the context of the legalization provisions applicable to Special Agricultural Workers:

> "In recognition that the fear of prosecution or deportation would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status, the Reform Act directed the Attorney General to enlist the assistance of a variety of nonfederal organizations to encourage aliens to apply and to provide them with counsel and assistance during the application process." (*McNary*, 111 S. Ct. at 892)

Indeed, upon enactment of IRCA, INS representatives admitted publicly to difficulty adjusting to their "change of hats":

> "'It's a complete departure for me,' said Dona L. Coultice, until recently a deputy assistant regional commissioner handling detention and deportation of illegal aliens. Now she is deputy head of the region's new legalization office, obliged to find ways to quickly process the applications of several hundred thousand aliens expected to seek legal resident status under the law's amnesty provisions. 'It's like a 180-degree turn because now I'm working to keep people in as opposed to locking them up or sending them away.'" (Mathews, *Awaiting A Deluge At The INS; Agency Prepares For Law's Advent*, WASH. POST, March 10, 1987, at A13.)

§1255a(c)(1)-(3). Congress hoped that the availability of the QDEs would "encourage participation among undocumented aliens who fear coming forward" before the INS. H.R. REP. 99-682 at 73, 5677.

The Ninth Circuit upheld the principle of maximizing participation in the legalization program when it reasoned that:

> "Congress intended for aliens to have a twelve-month period in which to apply for legalization and specified that the legalization program be implemented in a liberal and generous fashion. *The INS's erroneous interpretation of the Act in reality deprived the aliens of the full twelve-month application period Congress had provided for them.* It would be contrary to congressional intent to foreclose these aliens' applications." (*Catholic Social Servs.*, 956 F.2d at 922)(emphasis added)[4]

In addition to maximizing participation in the legalization program, the legislative history reveals that Congress had at least two additional issues in mind when it drafted the legalization provisions of IRCA: specifically, Congress hoped to eliminate the "shadow underground" in which so many immigrants have lived for so many years (and thereby free the INS to refocus its enforcement activities along the United States borders and halt new flows of undocumented migrants), and to avoid the devastating prospect of deporting

[4]The Ninth Circuit's sentiment of fairness toward Respondents—that they should not be unjustly (and irrevocably) penalized by the INS's promulgation of illegal regulations—echoes previous decisions involving undocumented persons. *See Villena v. INS*, 622 F.2d 1352, 1360 (9th Cir. 1980) (suspension of deportation proceeding: "Villena should not be penalized because of an unjustified INS delay in responding to his petition within a reasonable period of time . . . or because of the INS' failure to effect his deportation.").

people away from their families and lives in the United States. Given the significance of this legislative history to the Court's decision in this case, we quote extensively from the House and Senate Committee Report accompanying IRCA (and specifically discussing the legalization program):

> "The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars. *However, because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill.*
>
> "Continuing to ignore this situation is harmful to both the United States and the aliens themselves. *However, the alternative of intensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage.*
>
> "The Committee believes that the solution lies in legalizing the statuts [sic] of aliens who have been present in the United States for several years, recognizing that past failures to enforces [sic] the immigration laws have allowed them to enter and to settle here.

> "This step would enable INS to target its enforcement efforts on new flows of undocumented aliens and, in conjunction with the proposed employer sanctions programs, help stem the flow of undocumented people to the United States. It would allow qualified aliens to contribute openly to society and *it would help to prevent the exploitation of this vulnerable population in the work place.*
>
> "The Committee strongly believes that a one-time legalization program is a necessary part of an effective enforcement program and that a *generous* program is an essential part of any immigration reform legislation." (H.R. REP. 99-682 at 49, 5653) (emphasis added) (quoted in *McNary v. Haitian Refugee Center, supra*, 111 S. Ct. at 891 n.4)

Hence, the district courts' well-crafted equitable relief effectuates, rather than frustrates, the public policies established by Congress in passing IRCA. It is plain that in 1986 Congress was "well aware that there were large numbers of potential IRCA applicants." Kanstroom, *Judicial Review Of Amnesty Denials: Must Aliens Bet Their Lives To Get Into Court?*, 25 HARV. C.R.-C.L. L. REV. 53, 66 (1990). Indeed, it was the *explicit intent* of Congress to lift these persons out of their unregulated and vulnerable status by granting them a chance at legalization. *McNary*, 111 S. Ct. at 891. Moreover, Congress recognized that because thousands of undocumented immigrants have substantial familial and community ties to the United States, deportation would result in unacceptable hardship and despair.[5]

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[5]For Respondents, these ties have been forged by more than 10 years presence in the United States during which they have become extensively integrated into their communities. More than one observer has suggested

(continued...)

131 CONG. REC. S11260 (Sept. 11, 1985) and *id.* S11613 (Sept. 17, 1985)(remarks of Sen. Simpson (R-WY), Senate Floor Manager of IRCA) ("We are really not doing much deporting of illegal undocumented persons who have United States citizen children. We do not do that. We are not that kind of country . . . . We do not like to do those things.")).

Significantly, Congress foresaw that the INS's role in implementing IRCA would be crucial to properly effectuate Congressional intent. The House and Senate Report warns that:

> "[u]nnecessarily rigid demands for proof of eligibility for legalization could seriously impede the success of the legalization effort. *Therefore, the Committee expects the INS to incorporate flexibility into the standards for legalization eligibility.*" (H.R. REP. 99-682 at 73, 5677)

See also Lichtman, *Individual Rights Under IRCA, Title VII, and Other Authorities*, 3 LAB. LAW. 729 (1987) ("the actual value of IRCA will be much affected by how the INS and the Justice Department implement restrictive regulations and the extent to which they are upheld by the courts."). Congress

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[5](...continued)
that this integration, or "contacts" with this country, should be legally recognized and protected. *See* Note, *The Procedural Due Process Rights Of Legalization Applicants Under The Immigration Reform and Control Act of 1986: These Are The Procedures That Try Men's Souls*, 39 SYRACUSE L. REV. 1381, 1399 (1988) ("Inherent in IRCA is the proposition that the intangible links between aliens in the United States illegally and their social and economic communities should be given legal recognition."). *See also* Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WISC. L. REV. 955, 983 (1988)("The law's protection and recognition of undocumented immigrants in certain contexts demonstrates that these immigrants have a legal identity distinct from that of alien. . . . This identity derives from their personhood and their territorial presence, and it demarcates a certain sphere of formally protected activity accorded to the acknowledged community members.")

therefore must have contemplated that the INS would promulgate regulations *consistent with* the generous spirit pervading IRCA. The INS's failure to do so—indeed, its promulgation of restrictive regulations directly *in conflict with* the spirit of IRCA—surely cannot be condoned. Otherwise, Respondents, whom Congress clearly intended to have the opportunity to apply for legalization, will be forever and unfairly foreclosed from doing so. The resulting implications are unacceptable: Respondents will be forced back into the unregulated shadows of our society and subject to the constant threat of deportation and separation from their families and the lives they have so laboriously built in this country.

B. Reversal By This Court Effectively Would Banish Hundreds Of Thousands Of Persons Unable Or Unwilling To Leave This Country Back To The Unregulated "Shadow Underground" That Congress Sought To Eliminate.

Amici urge this Court to consider the inevitable impact of a reversal in this case: briefly stated, approximately 300,000 class members will return to the "shadow underground" of this country from whence they emerged when, under the district courts' stay orders, they applied for legalization.

> "[M]ost of the undocumented workers excluded by the [legalization] process will remain in the United States. The result of this situation has been the creation and growth of a 'class of exploitable, clandestine and unorganized cheap labor for unscrupulous employers in the U.S.' . . . who take advantage of the unlawful alien's fear of deportation. The abuses may range from imposing longer work weeks to refusing to pay the worker for months of work." (Note, *The Discriminatory Impact*

Of the Immigration Reform and Control Act of 1986, 10 CHICANO L. REV. 14, 24-25 (1990))

See also Falkenthal, *The Adequacy Of Review For Aliens Denied Legalization Under The Immigration Reform And Control Act Of 1986: A Due Process Analysis*, 26 CAL. W. L. REV. 149 (1989-1990) ("Immigration experts estimate that most aliens who did not qualify for amnesty will stay in the United States, and will continue to be vulnerable to exploitation."). In an October 1989 report to Congress concerning immigration control efforts of the United States government, the Government Accounting Office ("GAO") admitted that there is no assurance that undocumented persons ordered to surrender for deportation actually do so.[6] Worse yet, over time this vulnerable population will grow, continuing to evade the law, to endure illegal and dangerous work conditions, to fail to report crimes that they suffer, to pay off landlords to avoid eviction and to delay seeking desperately needed medical treatment. Surely this tragic result cannot have been intended by Congress when it drafted IRCA and directed that it be implemented in "a liberal and generous fashion." H.R. REP. 99-682 at 72, 5676.

To the contrary, when it passed IRCA Congress knew that exploitation and victimization of illegal aliens was occurring within our borders and explicitly sought to eliminate it. Merino, *Compromising Immigration Reform: The Creation Of A Vulnerable Subclass*, 98 YALE L.J. 409, 415 (1988) ("Members of Congress realized that the existence of a shadow population and a subterranean economy is harmful to both legal workers and aliens unlawfully present in the

[6]*See* GAO, Report to the Chairman, Subcommittee on Immigration, Refugees and International Law, Committee on the Judiciary, House of Representatives, *Immigration Control: Deporting and Excluding Aliens From The United States* (October 1989). In this report, the GAO notes that "a 1984 nationwide INS study found that 76 percent of aliens ordered to surrender for deportation failed to do so." *Id.* at 49-50.

United States"). Similarly, the Select Commission on Immigration and Refugee Policy:

> "also recognized that undocumented aliens in the United States are vulnerable to exploitation, and employer sanctions could make them even more vulnerable. Illegal aliens in the United States live in constant fear of deportation. This fear forces aliens to live as fugitives, and makes aliens easily exploitable. Aliens are primarily employed where the wages are lowest and working conditions are the worst, in agriculture and small nonunion businesses. Despite the low pay and inhumane treatment imposed on aliens, they are unwilling to report violations of wage, hour and safety laws, because any contact with authorities can lead to deportation. Many aliens live in poverty due to their low wages. They are often unwilling to contact police when they are the victim of crimes. They are even reluctant to seek medical care for fear of deportation." (Falkenthal, *Adequacy of Review* at 158).[7]

As a result, legalization was seen by Congress as the only vehicle by which undocumented persons could rise out of

[7]*Accord*, Note, *A Human Rights Approach To The Labor Rights Of Undocumented Workers*, 74 CAL. L. REV. 1715 (1986) ("[Illegal immigrants are] disproportionately paid substandard wages, penalized for participating in union activities, and subjected to abysmal working-place environments."); Portes & Kincaid, *Alternative Outcomes Of Reform*, 22 SOCIETY no. 4 73, 76 ("Undocumented workers are usually subject to highly exploitative, unhealthy and degrading working conditions which they are virtually powerless to alter."); Corchado & Solis, *Immigration Law Creates A Subclass of Illegals Bound To Their Bosses and Vulnerable To Abuses*, WALL ST. J., September 2, 1987 (describing reports of employers seizing their new advantage by "cutting illegals' wages, forcing them to work without overtime and even physically abusing them.").

the exploited underclass in which they live and the United States could regain control of its borders. H.R. REP. 99-682 at 49, 5653.

In addition to those who will return to the shadows, there will be those who will voluntarily deport if apprehended, but who will soon thereafter attempt to return to the lives they established in the United States. As mentioned above, in enacting IRCA Congress paid heed to the familial, social and economic bonds that long-term resident undocumented persons develop with this country and that strongly pull them back here. *See* Part A, *supra* (quoting H.R. REP. 99-682 at 49, 5653).[8] Congress therefore implicitly acknowledged that which immigration experts have long recognized: the impetus to immigrate is largely a

[8]In addition, immigration experts have identified factors in the home countries that push people to immigrate to the U.S. "For most aliens, returning to their home countries is not a viable option, because it means returning to even greater poverty and oppression." Falkenthal, *The Adequacy of Review For Aliens Denied Legalization Under the Immigration Reform and Control Act of 1986: A Due Process Analysis*, 26 CAL. W. L. REV. 149 (1989-90). Or, as stated more explicitly by Peter Schuck in *Overview: Domestic Implications Of Immigration Policy*, 7 YALE L. & POL'Y REV. 1 (1989):

> "Clearly, the conditions propelling people toward the United States have never been stronger. Population pressures in the Third World, most notably in nearby Latin America, are building rapidly. The labor force in Latin America alone will grow by more than 90 million workers between the years 1980 and 2000. This increase of 77% will make it virtually impossible to maintain even the dismal current levels of employment prevailing there." (*Id.* at 4)

Even the GAO acknowledges that immigration cannot be completely deterred by legislation in light of conditions in other countries. *See* GAO, Briefing Report to Congressional Requesters, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers* (March 1988) at 9 ("Given increasing 'push' factors in many traditional sending countries (for example, due to worsening economic conditions), illegal immigration is likely to continue [after IRCA], though probably at a lower rate.")

function of the supply and demand functions of the international labor market, which explains why non-economic deterrent methods do not work to halt illegal entry to this country.[9] *See* Note, *A Human Rights Approach To The Labor Rights Of Undocumented Workers*, 74 CAL. L. REV. 1715, 1718 (1986) ("Decisions to migrate result from highly coercive political, social and economic forces."). In short, it is very difficult to completely "seal" the borders of the United States.[10]

Because Congress explicitly sought in enacting IRCA to eliminate the "shadow underground" and to enable

[9]One commentator theorizes that the level of border enforcement is explained at least in part by the desire of organized interest groups to influence domestic wages:

> "Based on data covering the years 1900 through 1982, immigration policy enforcement was indeed found to be countercyclical, becoming more restrictive during economic downturns and easing during economic expansions." (Shughart, Tollison & Kimenyi, *The Political Economy of Immigration Restrictions*, 4 YALE J. ON REG. 79, 81 (1986))

Indeed, Congress's enactment of employer sanctions incident to IRCA represents a fundamental change in legislative policy—away from thinking of controlling immigration as a law enforcement issue and towards thinking of controlling immigration as an economic issue. The employer sanctions provision prohibits employers from hiring, recruiting, or referring for a fee immigrants known to be unauthorized to work in the United States. Employers violating this provision are subject to a series of civil fines, or criminal penalties when there is a pattern or practice of violations. *See* INS, *Statistical Yearbook of The Immigration and Naturalization Service, 1987*, at xv.

[10]In addition to immigrants' sheer determination to overcome barriers to entering the United States, there is a purely geographic happenstance facilitating their attempts. *See* Nichols, *The United States Immigration Reform And Control Act of 1986: A Critical Perspective*, 8 NW. J. INT'L L. & BUS. 503 (1987). Specifically, Ms. Nichols notes that the primary reason the INS cannot seal the United States' southern border is because of its physical length. "While most countries have immigration controls at their borders, they do not share a 2,000 mile permeable southern border with the country from which most undocumented aliens come." *Id.* at 521.

certain immigrants—*including* Respondents—to apply for legalization, the Ninth Circuit properly concluded that the equitable relief fashioned by the distinct courts was appropriate and consistent with that congressional intent.

C. Reversal By This Court Would Condemn Respondents And Their Families To The Constant Threat And Recognized Hardship Of Deportation.

Although the vast majority of class members is likely to return to the shadows if this Court should reverse the Ninth Circuit, the threatened hardship of deportation would remain. *Amici* contend that it is fundamentally unfair to allow those that Congress intended be granted amnesty to be subjected to the hardship of deportation, or the constant threat of deportation, through no fault of their own. Hence, *amici* urge this Court to reaffirm its historically compassionate approach towards persons potentially facing the devastating prospect of deportation from this country. After all, this Court has labelled deportation "a drastic sanction, one which can destroy lives and disrupt families" (*Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963)); an event that may result in loss "of all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)); and the equivalent of "banishment or exile" (*Fung Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).[11] Because of the enormity of deportation, this Court has followed the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

In the context of suspension of deportation cases filed pursuant to 8 U.S.C. Section 1254(a), federal courts have shown their willingness to approve relief for undocumented immigrants who have established significant ties with the United States and can demonstrate that their

[11] *See* authorities in Note, *Judicial Review Of "Extreme Hardship" In Suspension Of Deportation Cases*, 34 AM. U. L. REV. 175 (1984).

deportation would result in "extreme hardship" to themselves or to family members lawfully residing in the United States.[12] The factors typically considered to determine whether such hardships exist in a particular case include: (1) the applicant's family ties in the United States and abroad; (2) the age and health of the applicant (and his or her family); (3) the applicant's length of residence in the United States; (4) the condition, both economic and political, in the applicant's home country; (5) the financial status of the applicant; (6) the possibility of other means of adjustment of status; and (7) the applicant's immigration history. *Ramos v. INS*, 695 F.2d 181, 189 n.20 (5th Cir. 1983) (citing factors considered by the BIA). The circuit courts have indicated that the single most important hardship factor may be the contemplated separation of the applicant from his or her family living in the United States. *E.g.*, *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981), *cited with approval in Antoine-Dorcelli v. INS*, 703 F.2d 19, 21 (1st Cir. 1983).

Recent decisions of the circuit courts concerning suspension of deportation proceedings plainly reflect the Congressional concern for the deleterious effect deportation may have on the applicant and his or her family members. For example, in *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987), the petitioners were a married couple who had been living in the United States since 1975 with their children, three of whom were United States citizens. *Id.* at 1421. All

[12] Of course, the INA commits the definition of "extreme hardship" in the first instance to the executive branch, i.e., to the Attorney General and his delegates. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). The Board of Immigration Appeals (hereinafter "BIA") is the agency responsible for final administrative review of suspension decisions; the BIA is a creation of the Attorney General and exists without statutory authority. *See* 8 C.F.R. §3.1 (1984) (discussing BIA's functions). "By reviewing the procedures by which the BIA reaches its deportation decisions, however, the [federal] courts continue to correct the injustice inherent in the application of the antiquated BIA concept of extreme hardship." Note, *Judicial Review of "Extreme Hardship" In Suspension Of Deportation Cases*, 34 AM. U. L. REV. 175, 177 (1984).

of the children spoke English as their primary language and were enrolled in public school. *Id.* In reversing and remanding the case to the BIA for consideration of the possibility of hardship from family separation, the court stated:

> "The importance and centrality of the family in American life is firmly established both in our traditions and in our jurisprudence. The Supreme Court has said, "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because it is deeply rooted in the Nation's history and tradition." (*Id.* at 1423 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977))

The court found that the BIA in assessing the potential for "extreme hardship" should evaluate not only the potential hardship to the petitioners themselves, but also to the individual family members—particularly the hardship that would be incurred by citizen children whose parents face deportation.[13]

The circuit courts do not hesitate to remand a particular case to the BIA for further reconsideration if it is concluded that the BIA (or INS) did not properly evaluate family issues in its analysis of "extreme hardship." In *Luna v. INS*, 709 F.2d 126 (1st Cir. 1983), the court chided the BIA for making a determination of no extreme hardship without even conducting a hearing:

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[13]*See id.* at 1424-25 (noting that "other circuits have recognized the principle that separation may be a crucial factor in determining extreme hardship" and citing *Ramos v. INS*, 695 F.2d 181 (5th Cir. 1983) and *Bastidas v. INS*, 609 F.2d 101 (3d Cir. 1979)); *see also Jara-Navarrete v. INS*, 813 F.2d 1340, 1342 (9th Cir. 1986) ("In reviewing BIA decisions involving hardship to United States children, generalized rather than individualized consideration, and cursory treatment of individual circumstances, constitute an abuse of discretion."); Statement of Sen. Simpson, *supra* at 12.

> "How does the Board know what attachments the children have formed after living in the United States for four years, from ages 12 to 16, 10 to 14, 8 to 12, and 7 to 11? And, without a hearing, how can it dismiss so easily the fairly serious claims about Luna's wife's illness? Moreover, what of a factor the Board does not mention—the nonmedical hardship to *Mrs.* Luna. She, a lawful resident, apparently must choose between staying with one or both of her parents in the United States and leaving with her husband." (*Id.* at 128)

See Saldana v. INS, 762 F.2d 824, 828 (9th Cir. 1985) (reversing and remanding decision of the BIA: "[t]he BIA gave no recognition to the trauma Saldana's wife, child and step-children would experience if the INS deported their alleged source of emotional and economic security. . ."); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983) (reversing and remanding to the BIA for consideration of hardship to petitioner's family).[14]

The potential for Respondents to suffer extraordinary hardship should they be separated from their

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[14]*See also Ramos*, 695 F.2d at 186 (prolonged and extensive geographic separation or removal of children from their parents "normally must be considered by the INS in its determination of whether 'extreme hardship' has been shown"); *Ravancbo v. INS*, 658 F.2d 169, 174 n.6 (9th Cir. 1981) (citing H.R. REP. No. 1199, 85th Cong., 1st Sess. 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020 for congressional intent "to provide for the liberal treatment of children" in the immigration context); *Villena v. INS*, 622 F.2d 1352, 1359 (9th Cir. 1980) ("the Board must consider what effect the deportation will have on the citizen child and whether the child will suffer extreme hardship"). *See* Guendelsberger, *Implementing Family Unification Rights In American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253 (1988) (arguing that a constitutional right to family unification of the nuclear family should be recognized and implemented in immigration law).

families cannot reasonably be disputed.[15] As the following excerpts from the Joint Appendix demonstrate, many—if not most—of Respondents have children who are United States citizens and/or live with family members who have or are eligible for legal status in this country. Many persons in the Respondent classes have resided in the United States and have been productively employed for more than 20 years.

> "I entered the United States in 1970 without inspection at San Ysidro, California, and have, since that date, resided unlawfully in this country. I live[] with my wife and two United States children, ages 9 and 11, in Parlier, California. I am employed in agricultural work and support my wife and children. . . . The expulsion of my wife and myself would cause severe hardship to ourselves and our children. . . . We would be forced to either move our children to Mexico, where educational opportunities and health services are barely available, or leave our children behind to be placed in a foster home in the United States." (Joint App. at 160-162 (Declaration of Onesimo Nunez-Sanchez))

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[15]Ironically, while the INS evidently believes IRCA cannot be interpreted to alleviate family hardship in this case, the INS in 1990 decided that IRCA provided it the authority to administratively implement its "Family Fairness" program. This program granted permission to spouses and unmarried children of legalization applicants to stay in the United States if they were in this country before November 1, 1986. *See* Meckel, *Amnesty Policy Change "Wonderful" for Families*, HOUSTON POST, Feb. 3, 1990, at A1 (Statement of INS Commissioner Gene McNary: "To split families simply encourages further violation of the law as they (illegal aliens) attempt to reunite.") It is virtually certain that Respondents and their families will undergo the same hardship and dislocation the INS recognized and resolved to avoid just two years ago if this Court reverses the Ninth Circuit and denies Respondents the opportunity to have their legalization applications decided.

> "I live with my husband, Roberto Marquez, and my two daughters, who are U.S. citizens. The oldest daughter, Ebelia Maria Marquez, is 8 years old and the younger daughter, Mariela Marquez, is 6. Both were born at Stanford, California. . . . If I am not permitted to legalize, it would be a great tragedy for my whole family. My husband is eligible for amnesty and is applying. My daughters are U.S. citizens. But if I am deported, the whole family would have to leave this country and live in Mexico. The girls are in school here, and are learning very well, completely in English. The school in San Nicolas, where my parents live, is not very good, unlike the schools here, and there is no secondary school. You have to pay a lot to go to school after the sixth grade in another town, and it's likely that we would not be able to pay what is required. . . . Here in East Palo Alto, we live in a house which we are buying. . . Life would be very hard for me and for my family if we have to leave our home here and go to Mexico." (*Id.* at 164-66 (Declaration of Eduvijes Marquez))

Indeed, given the demonstrated potential for family hardship, if this Court reverses the Ninth Circuit and forecloses Respondents' opportunity to have their legalization applications decided, *amici* predict that tens of thousands of class members will challenge any deportation orders by filing applications for suspension of deportation under 8 U.S.C. Section 1254. The immediate result would be to overwhelm both INS administrative adjudication and review machinery, not to speak of the effect on a federal judiciary already severely backlogged with cases. Because Congress plainly did not intend in enacting IRCA to *increase* the number of persons subject to deportation, nor to tear Respondents from

the security of their families, *amici* urge this Court to affirm the district courts' grant of equitable relief.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Ninth Circuit's conclusion that district courts have the equitable authority to extend the time period for Respondents to apply for legalization under IRCA.

DATED: September 21, 1992.

Respectfully,

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